

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

Case No. A-5871

APPEAL OF ANDREW G. MULITZ AND GEORGE S. MORGAN

OPINION OF THE BOARD

(Hearing held June 18, 2003)
(Effective Date of Opinion: October 29, 2003)

Case No. A-5871 is an administrative appeal filed by Andrew G. Mulitz and George S. Morgan (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in issuing Demolition and Move Permit No. 29114, issued on January 17, 2002 to demolish a single-family dwelling, and Building Permit No. 29116, also issued on January 17, 2003 to construct a single-family dwelling, for the property located at 4806 Morgan Drive, Chevy Chase, Maryland (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on June 18, 2003. Appellants Andrew G. Mulitz and George S. Morgan represented themselves. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal **denied**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 4806 Morgan Drive in Chevy Chase, is an R-60 zoned parcel identified as Lot 10, Block D. Prior to January 17, 2003, the Property was improved by a single-family dwelling. The Appellants are adjoining property owners - Mr. Mulitz resides at 4808 Morgan Drive and Mr. Morgan resides at 4804 Morgan Drive.

2. On October 28, 2002, "Patrick K. Keating & Co., Inc.," applied to DPS for a permit to demolish or move the single family dwelling located on the Property. The application lists "Patrick K. Keating" as the contractor. The application is signed under oath by "Patrick K. Keating" as "property owner or owner's authorized agent." (Exhibit 5-1). Below the signature line, the application form states, "If authorized agent, complete Affidavit on back of application." No affidavit is attached to Exhibit 5-1.

3. Also on October 28, 2002, "Patrick K. Keating" applied to DPS for a building permit to construct a single family dwelling on the Property. The application lists "Patrick K. Keating & Co., Inc.," as the contractor. No signature appears on the signature line, but below it is printed the name "Patrick K. Keating." (Exhibit 5-3). Below the signature line, the application form states, "If authorized agent, complete Affidavit on back of application." No affidavit is attached to Exhibit 5-3.

4. On January 17, 2003, DPS issued Demolition/Move Permit No. 291114 to "Patrick K & Co Inc Keating," granting permission to demolish a single family dwelling on the Property (Exhibit 5-2). On the same date, DPS issued Building Permit No. 291116 to "Patrick K. Keating Co., Inc.," granting permission to construct a single family dwelling on the Property (Exhibit 5-4).

5. Subsequent to January 17, 2003 the house on the Property was demolished¹ and construction of a new single family dwelling began.

6. On February 3, 2003, an application for a revised building permit was submitted to DPS naming "Patrick K. Keating & Co." as the applicant (Exhibit 5-5). The revised application was submitted in order to change the house type and site plan. On page 2 of the application is an affidavit naming "Patrick K. Keating" as owner of the Property and declaring and affirming that the work proposed is authorized by the property owner. The affidavit is signed by Judy Forrester.

7. In response to a complaint, DPS inspected the Property on February 13, 2003 and determined that the footings and foundation of the dwelling did not match the site plans for the approve permit. DPS issued a stop work order on February 14, 2003.

8. On March 17, 2003, DPS issued a revised building permit, Building Permit No. 297427, to "Patrick K. Keating," permitting the construction of a single family dwelling according to the revised plans.

9. Susan Scala-Demby, Permitting Services Manager for DPS, testified that she reviewed the revised site plan and building plans submitted with the

¹Mr. Spicer indicated that the demolition work actually began before the permit was issued and that DPS had issued a citation to the owner.

application for Building Permit No. 297427(Exhibits 5-8 through 5-25) and that they complied with all applicable setback, height, lot coverage and other zoning and building requirements of the Montgomery County Code.

10. Ms. Scala-Demby further testified that, with respect to the demolition and building permit forms, DPS's practice is to permit a contract purchaser to sign as an agent of the owner. She did not know whether an affidavit was signed as part of the original building and demolition permit applications.

11. Mr. Mulitz testified that he was told by the previous owner of the Property that the owner had stored cyanide and other caustic materials in the basement of the house on the Property. Mr. Mulitz stated that he did not receive prior notice of the demolition of the house and is concerned about the potential for the contamination of the land in the area. Mr. Mulitz also expressed his concerns that the demolition and construction process was conducted in an unsafe manner. He stated that the site was not fenced, trees were destroyed, and improper drainage was installed.

12. Mr. Lynn Etheridge, a resident of 4805 Derussey Parkway, which is located behind the Property, testified that, contrary to the building plans approved by DPS, the rear of the house that is being constructed on the Property is four stories tall.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-43.(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered de novo. The burden in this case is therefore upon the County to show that the permits were properly issued.

2. As a preliminary matter, the County moved to dismiss the appeal with regard to the Demolition/Move Permit No. 291114 on the grounds of mootness. The County argued that, because the structure that is the subject of the demolition permit has been demolished and no longer exists, there is no relief that this Board can grant to the Appellants. Section 8-23(b) of the Code provides that the authority of the Board is to "affirm, modify, or reverse the order or decision of the Department." The Board concludes that, even if the Appellants were to prevail in their contention that the demolition permit was improperly issued, the modification or reversal of the decision to issue the permit would

provide them with no effective relief. Consequently, the Board is compelled to dismiss the Appellants' appeal with regard to the demolition permit.²

3. With respect to the building permit for the Property, the Appellants allege that the application for the permit was not made by a qualified person. Section 8-24(c) of the Code provides:

“Qualified applicants. Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant and of the responsible officer, if the owner or lessee is a corporate body, shall be stated in the application.”

In this case the original building permit application listed Patrick K. Keating as the applicant, but no signature appears on the application and no affidavit is attached. If this were the only application submitted for the work, the Board may have been compelled to find a violation of Section 8-24(c).³ The revised application that was later submitted for the revised work, however, supplants the first. It names “Patrick K. Keating & Co.” as the applicant and contains an affidavit naming “Patrick K. Keating” as owner of the Property and declaring and affirming that the work proposed is authorized by the property owner. The affidavit is signed by Judy Forrester.

On its face, the second application was properly authorized. The Code places no obligation upon DPS to investigate whether the person making the application is in fact the owner in fee or agent of the owner of the property. Rather, the Code allows DPS to simply rely on the affidavit of the agent, made under oath and penalty of perjury, that the agent is authorized to make the permit application on behalf of the owner and that the correct owner authorized the work. To require more would place an unreasonable administrative burden on DPS and slow the permitting process to a crawl.

²Nonetheless, the Board is concerned that the Appellants may not have received proper notice of the demolition. Section 8-27 of the Code requires DPS to send written notice of a demolition to all adjoining and confronting property owners, or the applicant must post the property with a sign, at least 10 days before issuance of the permit. We suspect that if this procedure had been followed, this appeal may have been avoided.

³The appropriate remedy for such a violation, however, would be simply to require the owner to ratify the application by signing it.

Given the signed affidavit, the application is presumptively valid. It is then incumbent upon the Appellants to overcome the presumption of validity by showing that the application was not made or authorized by a qualified applicant. The Appellants presented no evidence, however, to show that Patrick K. Keating was not the owner of the Property, or that Judy Forrester was not an authorized agent, at the time of the revised application. Consequently, the Board concludes from the evidence that the permit application for the construction of the house on the Property was properly made in conformance with Section 8-24(c).⁴

4. The uncontroverted testimony of Ms. Scala-Demby establishes that the building permit was issued in full compliance with all applicable setback, height, lot coverage and other zoning and building requirements of the Montgomery County Code. The Appellants presented no evidence to prove otherwise. Consequently, the Board concludes that the building permit was not issued in error.

5. The Appellants presented testimony that the construction site is not being maintained in a safe manner and that the construction of the house on the Property is not being accomplished in accordance with the approved building plans. These allegations, even if true, are not material to the issue of the appeal - that is, they do not relate to whether the building permit was properly issued by DPS. Rather, they concern the enforcement of the permits that were issued. The Appellants' avenue of redress in this instance is to report any noncompliance to DPS for investigation and corrective action. If the Appellants are then not satisfied with the actions of DPS, they may have recourse to the Board.

6. The appeal in Case A-5871 is **DENIED**.

On a motion by Angelo M. Caputo, seconded by Allison Ishihara Fultz, and Chairman Donald H. Spence, Vice-Chair Donna L. Barron, and Member Louise L. Mayer in agreement, the Board voted 5 to 0 to deny the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

⁴The Board notes with concern, however, the several discrepancies and missing information among the several demolition and building permit applications and the permits themselves. For example, affidavits are missing from two of the applications and a signature from another. Also, the original building permit was applied for in one name and issued in another. The Board recommends that, in order to avoid future appeals of this nature, DPS ensure that applications and permits are carefully reviewed for completeness and accuracy.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of October, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.